82-1954

No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1982

JOSEPH ABADI,
Petitioner

-vs-

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Court of Appeals No. 81-1754

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STATEMENT OF QUESTIONS PRESENTED

I

Whether petitioner was deprived of his right to trial by jury when the district judge removed from the jury's consideration the element of materiality by instructing the jury that the representation in the claim filed by defendant was a material representation.

II

Whether petitioner's convictions are constitutionally infirm because the prosecution failed to adduce sufficient evidence to persuade any rational trier of the facts beyond a reasonable doubt that the petitioner was guilty of the crimes charged.

III

Whether the district judge committed prejudicial error by denying petitioner's pretrial motion to disallow the introduction by the prosecution of violations by petitioner of controlled substance laws.

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JURISDICTION OF THE COURT

The Opinion of the Court of Appeals sought to be reviewed is dated May 9, 1983 and it was filed on May 9, 1983.

Jurisdiction to review this Opinion is conferred, it is believed, upon this Court by 28 USC 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment 5, United States Constitution:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment 6, United States Constitution:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATUTE INVOLVED

18 USC §1001:

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully . . . makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be. . . .

STATEMENT OF THE CASE

Petitioner was charged in a 28 count indictment with making false statements within the jurisdiction of a government agency in violation of 18 USC 1001, in the United States District Court for the Eastern District of Michigan.

Petitioner is an osteopathic physician; the counts involved 7 former patients of petitioner; the counts covered a time period from July through November, 1978. In each count it was alleged that petitioner made a false representation or statement on a Michigan Medical Claim Form, the false representation or statement being that petitioner had performed on the date and for a patient specified a spinal manipulation.

The case was tried to a jury.

Petitioner was convicted on all 28 counts. The court sentenced petitioner to a term of 5 years imprisonment and a $20,000 committed fine.

Petitioner appealed his convictions to the United States Court of Appeals for the Sixth Circuit. His convictions were affirmed by that court.

STATEMENT OF PERTINENT FACTS

It was stipulated between the parties that the Department of Health, Education and Welfare was responsible for the administration of a program known as Medicaid, that

part of the money to support the program was provided by the federal government and that Michigan participated in the program at times covered by the indictment.

An employee of the Michigan Department of Social Services testified; he identified 28 Medicaid claims received by the department; these 28 exhibits presumably corresponded to the 28 counts of the indictment.

The government's theory of the case was that petitioner had represented on the 28 claims that he had performed a spinal manipulation on the patient named in the claim whereas in fact he had not performed such spinal manipulation, and that this had been done knowingly and willfully.

Seven former patients of petitioner who had been named in the 28 counts as the patients upon whom petitioner had claimed to have performed spinal manipulations were called as witnesses. Although differing in details, the testimony of these seven witnesses can be summarized as follows: each was vague as to the dates of his visits to petitioner's medical offices; each said he could not recall ever receiving a spinal manipulation or receiving one after a certain visit; some of the patients testified to having received prescriptions for Soma, Valium and/or Empirin from petitioner.

The government called as an expert witness a doctor of osteopathy. He testified that spinal manipulation is an acceptable treatment for a diagnosis of somatic dysfunction which should be based on three physical findings: (1) tissue texture abnormalities, (2) asymmetry of the spinal segments, and (3) alteration in range of movement of the joint. Although the witness testified that ideally the patient should be informed of the treatment in order to obtain his consent and that a patient would always be aware that a spinal manipulation had occurred, the witness also testified that a doctor can do two things at once, that it was possible while examining the ear for a doctor to move the head of a patient another half inch and that that would be an osteopathic manipulative therapy which could properly be

billed, that it was not uncommon for a doctor to do treatment and diagnosis concurrently, and that not all physicians follow text-book prescribed procedures and that new types of manipulative therapy come from clinical experience.

At the conclusion of the government's case, petitioner moved the court for a directed verdict of acquittal. This motion was denied.

Petitioner testified that his records which he brought to court reflected that he had performed manipulative therapy treatment to the seven patients in question on the dates set forth in the 28 counts. Manipulative therapy treatments could take from three to five seconds to 20 seconds.

Petitioner renewed his motion for a directed verdict; this motion was denied.

REASONS FOR GRANTING THE WRIT

I

The statute under which petitioner was charged—*18 USC 1001*—condemns a person who 'knowingly and willfully falsifies, conceals or covers up by any trick, scheme or device *a material fact*' [emphasis added].

The district judge instructed the jury that 'The issue of materiality, however, is not submitted to the Jury for your decision but rather is a matter for decision of the Court. You are instructed that the statement charged in the indictments (sic) is a material statement' (S95).*

At the conclusion of the court's jury charge, petitioner objected to the above instruction (S104-105).

Subsequent to verdict, petitioner filed a motion for a new trial alleging, *inter alia*, that the district judge erred in the above instruction. This motion was denied.

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*The S in the parentheses stands for Supplemental volume of transcript covering day September 17, 1981 of trial; the numbers, to the pages therein.

The Court of Appeals ruled that the question of the materiality issue should be treated as a question of law and as such, it was the responsibility of the court to interpret the substantive law, the court following like rulings in *United States* v *McIntosh*, 655 F2d 80, 82 (CA5, 1981), *cert. denied*, ____ US ____, 102 S Ct 1450 (1982); *United States* v *Adler*, 623 F2d 1287, 1292 (CA8, 1980); *United States* v *Bernard*, 384 F2d 915, 916 (CA2, 1967); *United States* v *Ivey*, 322 F2d 523, 529 (CA4), *cert. denied*, 375 US 953 (1963); *United States* v *Clancey*, 276 F2d 617, 635 (CA7 1960), *rev'd on other grounds*, 365 US 312 (1961); *Weinstock* v *United States*, 231 F2d 699, 703 (CADC 1956).

The 9th and 10th Circuits have ruled that materiality of the charged statement is a question of fact and that it must be submitted to the jury for their determination. *United States* v *Irwin*, 654 F2d 671, 677 n.8 (CA10 1981), *cert. denied*, ____ US ____, 102 S Ct (1982); *United States* v *Valdez*, 594 F2d 725, 729 (CA9 1979).

The rationale for the rule favored by the majority of the circuits seems to be a solicitude for the rights of the accused to the extent that the courts desire to protect the accused from trivial falsehoods being charged against him.

However, it would seem that the courts in their solicitude to protect the accused against trivial accusations have deprived the accused of a much more important right, *viz*, his right under the *6th Amendment* to trial by jury.

'Materiality' seems to be an element of the offense as defined by statute. Materiality has been referred to as an essential element of the offense as defined by statute. *United States* v *Valdez*, 594 F2d 725, 728 (CA9 1979); *United States* v *Krause*, 507 F2d 113, 118 (CA5 1975).

The better approach to the question is to be found in *United States* v *Irwin*, *supra*, where the Court said:

> 'We are not persuaded that our procedure is wrong and remain convinced that materiality is a factual question to be submitted to the jury with proper instructions like

other essential elements of the offense, unless the court rules, as a matter of law, that no submissible case is made out by the Government on the issue of materiality.' 654 F2d 671, 677 n 8.

This Court should resolve the split in the circuits on this important fundamental question.

II

An important issue in the case at bench was whether petitioner had in fact performed a spinal manipulation as claimed under the 28 counts of the indictment.

It was incumbent on the government to prove beyond a reasonable doubt that petitioner had not performed a spinal manipulation as claimed under the 28 counts. *5th Amendment; In re Winship*, 397 US 358 (1970).

The individual patient could not by his or her testimony establish that no spinal manipulation was performed by petitioner on him or her because the patient had not been qualified as an expert witness who would recognize whether a spinal manipulation had been performed.

The one expert witness called by the government conceded that the procedure known as spinal manipulation goes on from three to five seconds, that it is possible for a doctor to do diagnostic examination of the patient and therapeutic spinal manipulation at the same time, and that although he would prefer that the patient be told that the doctor was about to do a spinal manipulation, there are many manipulative therapy procedures.

Petitioner testified that his records in each instances reflected that he had done a spinal manipulation in connection with his physical examination of the patient under each of the 28 counts.

It is clear that petitioner was convicted under the 28 counts of the indictment without the government's having

proved beyond a reasonable doubt that petitioner did not perform the claimed spinal manipulation.

The reason the jury convicted petitioner is found in the fact that the court permitted the government to adduce evidence that petitioner might have violated the controlled substance law. See below.

III

Prior to trial, petitioner moved the district court to prohibit the government from eliciting from the witnesses who were petitioner's patients that petitioner had prescribed certain drugs which were statutorily controlled substances for the improper dispensing of which criminal sanctions were provided. Petitioner argued that such testimony would be prejudicial in that it would tend to depict petitioner as a 'bad man', one prone to commit crime. This motion was denied.

During trial, the government elicited from each of the witness called by the prosecution who were patients of the petitioner testimony concerning the prescribing for them by petitioner of drugs which were defined as controlled substances under federal and state statutes, namely, Empirim, Valium and Soma.

It was the government's theory that the patient-witnesses went to the petitioner's offices for drugs and not for spinal manipulations, that the prescribing of drugs by petitioner was part of the *res gestae*, and that the jury was entitled to be apprised of the whole 'picture' and the 'setting' of the crimes charged.

Petitioner maintained that the evidence should be excluded under *FRE 403* as being more prejudicial than probative.

In argument to the jury, the government attorney stated that petitioner's patients 'were victims of' petitioner, that

'they received drugs they didn't need', that the patients 'received no medical help', that they received drugs that had 'nothing to do with anything that the patient needed'.

The district judge committed prejudicial error by permitting the government to elicit testimony concerning the prescribing by petitioner of drugs which were controlled substances for there is no doubt that the government convicted petitioner not of knowingly and willfully making false statements but rather of improperly prescribing controlled substances. See *United States* v *Weir*, 575 F2d 668 (CA8 1978).

CONCLUSION

It is respectfully urged to this Court that the foregoing issues involve important question of constitutional law and the proper administration of justice in the federal courts that should be addressed and settled by this Court.

RELIEF SOUGHT

Petitioner respectfully prays this Court issue its Writ of Certiorari to the Court of Appeals for the Sixth Court.

Respectfully submitted,

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June 1, 1983

RECOMMENDED FOR FULL-TEXT PUBLICATION
See, Sixth Circuit Rule 24

No. 81-1754

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JOSEPH ABADI,
Defendant-Appellant.

ON APPEAL from the United States District Court for the Eastern District of Michigan.

Decided and Filed May 9, 1983

Before: CONTIE and KRUPANSKY, Circuit Judges; and BALLANTINE, District Judge.*

CONTIE, Circuit Judge. Dr. Joseph Abadi appeals his conviction on 28 counts of making false statements to a United States agency, 18 U.S.C. § 1001. The defendant was sentenced to five years imprisonment and fined $20,000.00. For the reasons stated below, we affirm.

In May 1981, the defendant, an osteopathic physician, was charged in a 28 count indictment for making false statements to the United States in violation of 18 U.S.C. § 1001. Each count charged that on various dates between June and Novem-

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* The Honorable Thomas A. Ballantine, Jr., United States District Judge for the Western District of Kentucky, sitting by designation.

ber 1978, the defendant made false statements to the Medicaid program by billing for spinal manipulations which he had not performed. At trial, the government relied in large part upon the testimony of seven patients who had allegedly received spinal manipulations from the defendant. These patients testified that the defendant had given them prescriptions for drugs such as soma and valium, but had rarely touched or examined them. The government also called Dr. Phillip Greenman, an expert in the field of osteopathy, who described the different methods and uses of spinal manipulation.[1] At the conclusion of trial, the jury convicted the defendant of all counts. On appeal, the defendant raises the following arguments: (1) he was denied his right to a trial by jury when the district court ruled that section 1001's materiality requirement was a question of law for the court and not a question of fact for the jury; (2) the evidence was insufficient to support his conviction; (3) the government's attorney made prejudicial remarks during his closing argument; and (4) the district court abused its discretion by admitting evidence which suggested that the defendant may have violated federal narcotics laws.

I.

Section 1001 has its origin in a statute passed over 100 years ago "in the wake of a spate of frauds upon the government." *United States* v. *Bramblett*, 348 U.S. 503, 504 (1955). While the original statute only prohibited "any person in the land or naval forces . . ." from presenting false claims to the United States, the present version prohibits all persons from making

[1] Dr. Greenman indicated that spinal manipulation is a form of manipulative therapy that can be applied to any of the elements of the muscular skeletal system, and particularly to portions of the cervical, thoracic and lumbar spine. Dr. Greenman also testified that spinal manipulation is done primarily to relieve "somatic dysfunction," which he defined as an alteration in the functional anatomy in the muscular skeletal system.

false statements or representations to a department or agency of the United States:

> § 1001. Statements or entries generally
>
> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Although the statute is necessarily couched in very broad terms, courts have read a materiality requirement into its second clause in order to exclude trivial falsehoods from the purview of the statute. *United States* v. *Beer*, 518 F.2d 168, 170-71 (5th Cir. 1975). Some courts have even referred to the materiality requirement as an essential element of the statute. *See, e.g., United States* v. *Valdez*, 594 F.2d 725, 728 (9th Cir. 1979); *United States* v. *Krause*, 507 F.2d 113, 118 (5th Cir. 1975).

The defendant contends that the issue of materiality is a factual question to be submitted to the jury like the other essential elements of the offense. This argument, however, has not fared well in the other circuits. When presented with this issue, the Second, Fourth, Fifth, Seventh, Eighth and District of Columbia Circuits have ruled that section 1001's materiality requirement is a question of law. *United States* v. *McIntosh*, 655 F.2d 80, 82 (5th Cir. 1981), *cert. denied*, — U.S. —, 102 S.Ct. 1450 (1982); *United States* v. *Adler*, 623 F.2d 1287, 1292 (8th Cir. 1980); *United States* v. *Bernard*, 384 F.2d 915, 916 (2d Cir. 1967); *United States* v. *Ivey*, 322 F.2d 523, 529 (4th Cir.), *cert. denied*, 375 U.S. 953 (1963); *United States* v. *Clancey*, 276 F.2d 617, 635 (7th Cir. 1960), *rev'd on other grounds*, 365 U.S. 312 (1961); *Weinstock* v. *United*

States, 231 F.2d 699, 703 (D.C. Cir. 1956). The Ninth and Tenth Circuits have ruled that this question is one of fact. *United States* v. *Irwin*, 654 F.2d 671, 677 n.8 (10th Cir. 1981), *cert. denied*, — U.S. —, 102 S.Ct. 1709 (1982); *United States* v. *Valdez*, 594 F.2d 725, 729 (9th Cir. 1979). While this circuit has not passed on this issue in the context of a false statement prosecution under 18 U.S.C. § 1001, we have ruled that materiality is a question of law in a perjury prosecution under 18 U.S.C. § 1621, *United States* v. *Giacalone*, 587 F.2d 5, 6 (6th Cir. 1978), *cert. denied*, 442 U.S. 940 (1979), and in a prosecution for false statements to a grand jury under 18 U.S.C. § 1623. *United States* v. *Richardson*, 596 F.2d 157, 165 (6th Cir. 1979). Moreover, this court cited the Fourth Circuit's *Ivey* decision to support its finding that materiality is a legal question in the prosecution of a union officer for filing a false financial report under the Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 439(b) and (d). *United States* v. *Franco*, 434 F.2d 956, 960-61 (6th Cir. 1970), *cert. denied*, 402 U.S. 915 (1971).

After careful consideration, we hold that the materiality issue in a section 1001 prosecution should be treated as a question of law. Although the materiality of a statement rests upon a factual evidentiary showing, the ultimate finding of materiality turns on an interpretation of substantive law. Since it is the court's responsibility to interpret the substantive law, we believe the district court properly treated the issue of materiality as a legal question.[2]

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[2] We do not believe that the materiality requirement should be treated as an "element" of 18 U.S.C. § 1001 in the sense that the prosecution must prove materiality beyond a reasonable doubt. *In Re Winship*, 397 U.S. 358, 364 (1970); *Cf. United States* v. *Giacalone*, 587 F.2d at 7. Instead, we view the materiality requirement as a judicially-imposed limitation to insure the reasonable application of the statute. Thus, the district court is required to find, as a matter of law, that the false statement or representation is material in a prosecution under section 1001.

II.

The defendant also contends that there is insufficient evidence to support his conviction. We disagree, and hold that, viewed in the light most favorable to the government, *Glasser* v. *United States*, 315 U.S. 60, 80 (1942), there is sufficient evidence for a rational jury to find guilt beyond a reasonable doubt. *United States* v. *Francis*, 646 F.2d 251, 261 (6th Cir.), *cert. denied*, — U.S. —, 102 S.Ct. 637 (1981). The defendant also contends that the government's attorney made statements during his closing argument which were both unsupported by the record and prejudicial. We note, however, that no objection was made by defendant's counsel and we find no plain error. *Fed. R. Crim. P.* 52(b). We also hold that the district court did not abuse its discretion by admitting evidence which suggested that the defendant may have been violating federal narcotics laws. The patients' testimony regarding their receipt of drugs revealed a portion of the overall scheme whereby the defendant gave drugs to his patients and then used their medicaid cards to bill for non-existent treatment. *Cf. United States* v. *Dudek*, 560 F.2d 1288, 1294 (6th Cir. 1977), *cert. denied*, 434 U.S. 1037 (1978).

Accordingly, the judgment of the district court is AFFIRMED.

No. 82-1954

In the Supreme Court of the United States

OCTOBER TERM, 1983

JOSEPH ABADI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the trial court was required to submit the question of materiality to the jury in a prosecution of petitioner for making false statements in violation of 18 U.S.C. 1001.

2. Whether the evidence was sufficient to support petitioner's convictions for making false statements.

3. Whether the trial court abused its discretion in admitting evidence concerning petitioner's prescription of certain drugs for his patients.

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In the Supreme Court of the United States

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No. 82-1954

JOSEPH ABADI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is reported at 706 F.2d 178.

JURISDICTION

The judgment of the court of appeals was entered on May 9, 1983. The petition for a writ of certiorari was filed on June 2, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted on 28 counts of making false statements in connection with claims submitted under the federally funded Medicaid program, in violation of 18 U.S.C. 1001. He was

sentenced to concurrent terms of five years' imprisonment on each count and was fined $20,000. The court of appeals affirmed (Pet. App. 1a-5a).

1. The evidence at trial showed that petitioner was an osteopathic physician who worked as a sole practitioner in Detroit. He often treated more than 100 patients in a single day (Tr. 280-285). Shortly after he opened his office in 1976, petitioner began treating seven individuals with real or feigned back problems and other medical complaints (Tr. 32-33, 35, 59, 68, 73, 171, 191, 203, 232, 234, 236, 243, 245, 247-248). These individuals, all Medicaid beneficiaries, visited petitioner on a weekly or biweekly basis. The principal, and in some cases sole, reason for their visits was to obtain prescriptions for drugs; petitioner freely prescribed valium, empirin, and soma for these individuals (Tr. 35-36, 40, 53, 69-70, 171-172, 174-175, 194-196, 229-230, 235, 245, 247-248, 254-255).

Petitioner examined the backs of four of the seven patients on their first or second visits to his office in 1976. Thereafter he did not examine or treat their backs in any manner (Tr. 35-36, 40, 58, 70, 73, 194-196, 207-211). At no time did he examine or treat the backs of the other three patients (Tr. 173-175, 181, 234-235, 237, 242, 247, 254).

The seven patients continued to visit petitioner's office and to receive prescriptions for drugs through and including the period of June to November 1978. Following these visits, petitioner submitted 28 Medicaid claim forms to the state Medicaid agency. On each form petitioner indicated that he had performed a spinal manipulation[1] on the patient

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[1]"Spinal manipulation" is a manual therapeutic technique for treating abnormalities in the muscular-skeletal system along the spine (Tr. 97-100). The technique is sometimes uncomfortable, takes between five minutes and an hour, and, like surgery, would normally be preceded by the patient's informed consent (Tr. 97, 106-107). A patient undergoing spinal manipulation would be aware of the procedure (Tr. 137).

(Tr. 92-93, 115, 151-153, 160-163). The state agency reimbursed petitioner for some of these claims (*e.g.*, Tr. 160-163).

2. Prior to trial petitioner moved to exclude evidence that he had prescribed controlled substances for the seven patients, citing Fed. R. Evid. 403. The trial court denied the motion. At trial, the court instructed the jury that the issue of materiality under 18 U.S.C. 1001 was a question for the court and that the statements on the Medicaid claim forms in question were material (JI Tr. 95).[2] Defense counsel objected to the instruction (*id.* at 104-105). The trial court denied petitioner's motion for a directed verdict of acquittal on the ground of insufficient evidence (Tr. 445-446).

3. The court of appeals affirmed (Pet. App. 1a-5a). Following the great weight of authority in the courts of appeals, the court held that materiality in a prosecution under 18 U.S.C. 1001 is a question of law to be decided by the court. The court rejected petitioner's claims that the district court abused its discretion in allowing petitioner's patients to testify about the drug prescriptions they obtained from petitioner and that the prosecutor had made improper statements during the closing argument, and it held that the evidence was sufficient to support the convictions.

ARGUMENT

1. Petitioner contends (Pet. 4-6) that the court of appeals erred in ruling that materiality is a question of law to be decided by the court. This Court recently denied certiorari in a case presenting the same contention. *Isenberg* v. *United States*, No. 82-967 (May 16, 1983). Review is likewise unwarranted in this case.

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[2]"JI Tr." refers to the transcript containing the jury instructions.

Petitioner recognizes (Pet. 5) that the court of appeals' ruling is consistent with the law in the majority of circuits. See, *e.g., United States* v. *Richmond,* 700 F.2d 1183, 1188 (8th Cir. 1983); *United States* v. *Fern,* 696 F.2d 1269, 1274 (11th Cir. 1983); *United States* v. *McIntosh,* 655 F.2d 80, 82 (5th Cir. 1981), cert. denied, 455 U.S. 948 (1982); *United States* v. *Bernard,* 384 F.2d 915, 916 (2d Cir. 1967); *United States* v. *Ivey,* 322 F.2d 523, 529 (4th Cir.), cert. denied, 375 U.S. 953 (1963); *United States* v. *Clancy,* 276 F.2d 617, 635 (7th Cir. 1960); *Weinstock* v. *United States,* 231 F.2d 699, 703 (D.C. Cir. 1956).[3] However, he suggests that the better rule is found in the Ninth and Tenth Circuits, which have approved the practice of submitting the question of materiality to the jury. See, *e.g., United States* v. *Irwin,* 654 F.2d 671, 677 n.8 (10th Cir. 1981), cert. denied, 455 U.S. 1016 (1982); *United States* v. *Valdez,* 594 F.2d 725, 729 (9th Cir. 1979).

Petitioner has cited no case, and we are aware of none, in which a court has overturned a conviction under 18 U.S.C. 1001 on the ground that the issue of materiality was not

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[3]See also 2 E. Devitt & C. Blackmar, *Federal Jury Practice and Instructions* § 28.09 (3d ed. 1977 & Supp. 1980). Moreover, this Court has recognized that the materiality of false statements generally is a question for the court. In *Sinclair* v. *United States,* 279 U.S. 263, 298 (1929), construing the pertinency requirement of a statute proscribing refusal to answer questions by congressional committees, the Court stated:

> The question of pertinency * * * was rightly decided by the court as one of law. It did not depend upon the probative value of evidence. That question may be likened to those concerning relevancy at the trial of issues in court, and is not essentially different from the question as to materiality of false testimony charged as perjury in prosecutions for that crime. Upon reasons so well known that their repetition is unnecessary it is uniformly held that relevancy is a question of law. * * * And the materiality of what is falsely sworn, when an element in the crime of perjury, is one for the court.

submitted to the jury. The Ninth Circuit has held in two cases that the trial court erred in itself deciding the question of materiality rather than submitting it to the jury, but in both cases it affirmed the convictions because it was clear that the statements at issue were material. See *United States* v. *Valdez, supra,* 594 F.2d at 728-729; *United States* v. *East,* 416 F.2d 351, 354-355 (9th Cir. 1969). The Tenth Circuit has not addressed the question whether a trial court commits reversible error by deciding the question of materiality. See *United States* v. *Irwin, supra,* 654 F.2d at 677 n.8, and cases cited therein.

Petitioner does not contend that his statements on the Medicaid claim forms that he had performed spinal manipulations on his patients were not material, and indeed there can be no doubt on this point. The information on the claim forms was the sole basis on which the state agency approved and paid petitioner's Medicaid claims (Tr. 148-149). In fact, some of petitioner's fraudulent claims for the provision of spinal manipulations were approved on the basis of his false statements (Tr. 160-163). Accordingly, it is clear that these statements "had a 'natural tendency to influence, or [were] capable of affecting or influencing, a governmental function' " (*United States* v. *Diaz,* 690 F.2d 1352, 1357 (11th Cir. 1982), quoting *United States* v. *Markham,* 537 F.2d 187, 196 (5th Cir. 1976), cert. denied, 429 U.S. 1041 (1977)). See, *e.g., United States* v. *Voorhees,* 593 F.2d 346, 350 (8th Cir.), cert. denied, 441 U.S. 936 (1979) (defendant who applied for and received illegal payments is not in a position to assert that his false statement was not material on the ground that it was incapable of producing illegal payments). Thus, the materiality of petitioner's statements was clearly established, and there is no reason to believe that any other court of appeals would have granted petitioner the relief he seeks. To whatever extent a conflict may exist, the present case does not provide an appropriate occasion for this Court to address it.

2. Petitioner also contends (Pet. 6-7) that the evidence was insufficient to support his convictions, because the government failed to prove the falsity of his statements that he had performed spinal manipulations. But the evidence, viewed in the light most favorable to the government (see *Glasser* v. *United States*, 315 U.S. 60, 80 (1942)), demonstrates that the government did carry its burden on this issue. A number of petitioner's patients testified that he did not render any back treatment for them, contrary to the statements on the Medicaid claims (see, *e.g.*, Tr. 35-36, 40, 58, 70, 73, 173-175, 181, 194-196, 207-211, 234-235, 237, 242, 247, 254). The court of appeals properly rejected petitioner's fact-bound contention, and no further review is warranted.

3. Finally, petitioner contends (Pet. 7-8) that the trial court abused its discretion in denying his motion to exclude evidence concerning his prescription of controlled substances for his patients, citing Fed. R. Evid. 403. However, the evidence was relevant to illustrate the context in which petitioner made his false statements. As the court of appeals noted (Pet. App. 5a), the patients' testimony about receipt of the drugs "revealed a portion of the overall scheme whereby [petitioner] gave drugs to his patients and then used their medicaid cards to bill for non-existent treatment." The term "controlled substances" was not used at trial, and the jury was not told that the prescriptions may have constituted criminal offenses. The court of appeals correctly held (*ibid.*) that the trial court did not abuse its discretion in admitting the evidence.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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